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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Eric Lamar Brown,)	No. CV-07-2615-PHX-GMS (MEA)
)	
Petitioner,)	ORDER
)	
v.)	
)	
Dora B. Schriro, et al.,)	
)	
Respondents.)	
_____)	

Pending before the Court is the Writ of Habeas Corpus of Petitioner, Eric Lamar Brown. (Dkt. # 1.) On August 26, 2008, Magistrate Judge Mark E. Aspey issued a Report and Recommendation (“R & R”) recommending that the Petition be denied. (Dkt. # 15.) Petitioner timely filed objections. (Dkt. # 17.) For the reasons below, the Court adopts the recommendation of Magistrate Aspey.

BACKGROUND

On January 13, 2000, Petitioner was found guilty by a jury of armed robbery, unlawful flight from a law enforcement officer, aggravated assault, resisting arrest, and misconduct involving weapons. On May 1, 2000, Petitioner was sentenced to concurrent sentences of six years imprisonment on the convictions for unlawful flight and aggravated assault, a

1 concurrent sentence of 4.5 years imprisonment pursuant to a prior attempted theft felony in
2 1994, and a concurrent sentence of twenty-eight years on the conviction for armed robbery.
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4 The R & R sets forth the procedural and factual background.¹

5 In his Petition for Writ of Habeas Corpus, Petitioner asserts four grounds for relief:
6 (1) his Fourteenth Amendment due process rights were violated by the prosecution's failure
7 to preserve potentially exculpatory evidence; (2) his Fourteenth Amendment due process
8 rights were violated by the prosecution's failure to disclose material evidence favorable to
9 the defendant; (3) his Fourteenth Amendment due process rights were violated by the state
10 knowingly presenting perjured trial testimony and by the state deliberately suppressing
11 exculpatory evidence; and (4) ineffective assistance of counsel. (Dkt. # 1.) The magistrate
12 Judge recommended that all four grounds be dismissed with prejudice.
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15 STANDARD

16 A "district judge may refer dispositive pretrial motions, and petitions for writ of
17 habeas corpus, to a magistrate, who shall conduct appropriate proceedings and recommend
18 dispositions." *Thomas v. Arn*, 474 U.S. 140, 141 (1985); *see also* 28 U.S.C. § 636(b)(1)(B);
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21 ¹In his objection, Petitioner notes errors in the R & R's recitation of the procedural
22 history. Specifically, the R & R states, "It is unclear if Petitioner sought review of [the
23 Superior Court's dismissal of the third petition for state post-conviction relief] by the Arizona
24 Court of Appeals." (Dkt. # 15, at 12.) Additionally, the R & R states that, "The Arizona
25 Court of Appeals denied review [of Petitioner's fourth action for state post-conviction relief]
26 on April 26, 2007." (*Id.* at 13.) Both of these statements are incorrect. Petitioner *did* seek
27 review from the Arizona Court of Appeals on his third petition for state post-conviction
28 relief. (Dkt. # 10, Ex. GG.) The Court of Appeals denied review on April 26, 2007. (Dkt.
10, Ex. HH.) Petitioner's fourth petition for state post-conviction relief was not appealed
to the Arizona Court of Appeals. Beyond those errors, the Court adopts the procedural and
factual history of the R & R as an accurate recital. Neither error is relevant to the analysis
or recommendation of the Magistrate Judge. *See discussion infra.*

1 *Estate of Connors v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993). Any party “may serve and
 2 file written objections” to the R & R. 28 U.S.C. § 636(b)(1). “A judge of the court shall
 3 make a *de novo* determination of those portions of the report or specified findings or
 4 recommendations to which objection is made.” *Id.* A district judge “may accept, reject, or
 5 modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*

7 **DISCUSSION**

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 9 Petitioner’s objections to the R & R include two substantive disputes with the
 10 Magistrate’s analysis. First, Petitioner objects to the Magistrate’s determination that the 1-
 11 year limitations period in the Antiterrorism and Effective Death Penalty Act (“AEDPA”) did
 12 not start anew after Petitioner learned that no blood had been collected from the crime scene.
 13 (Dkt. # 17, at 4-6.) Second, Petitioner objects to the Magistrate’s determination that his
 14 claims are procedurally defaulted. (*Id.* at 6-8.) After conducting a *de novo* review of the
 15 record, the Court will address Petitioner’s objections.
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17 **I. Is Petitioner Entitled to the AEDPA’s Alternative Start Date Based on “Newly** 18 **Discovered Evidence?**

19 The AEDPA, 28 U.S.C. § 2244 *et seq.*, applies to this case because Petitioner’s federal
 20 Petition was filed after the AEDPA’s effective date. *See Jenkins v. Johnson*, 330 F.3d 1146,
 21 1149 (9th Cir. 2003). The “AEDPA imposes a one-year statute of limitation on habeas
 22 corpus petitions filed by state prisoners in federal court.” *Id.* (citing 28 U.S.C. § 2244(d)(1)
 23 (“A 1-year period of limitation shall apply to [a petition] for a writ of habeas corpus by a
 24 person in custody pursuant to the judgment of a State court.”)). The limitation period
 25 generally begins to run when the state conviction becomes final “by the conclusion of direct
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1 review or the expiration of the time for seeking such review[.]” 28 U.S.C. § 2244(d)(1)(A);
2 *see White v. Klitzkie*, 281 F.3d 920, 923 (9th Cir. 2002) (“Under the AEDPA . . . a state
3 prisoner must file his federal habeas corpus petition within one year of the date his state
4 conviction became final.”). However, under section 2244(d)(1)(D) of the AEDPA, the 1-
5 year limitations period may begin to run anew from “the date on which the factual predicate
6 of the claim or claims presented *could have been discovered* through the exercise of due
7 diligence” rather from the date a state conviction became final. (emphasis added).
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10 The factual predicate to the Petitioner’s claims is the fact that no blood evidence from
11 the crime scene was collected. Petitioner argues that the “information was never before
12 known to the Petitioner” prior to his request for DNA testing in 2005, and therefore that the
13 fact qualifies as “newly discovered evidence” under the AEDPA. (Dkt. # 17, at 5.)
14 However, as the Magistrate concludes, this factual predicate could have been discovered
15 previously through the exercise of due diligence. As early as discovery in the first trial,
16 Petitioner was on notice that there was a factual discrepancy as to whether blood was
17 collected from the crime scene. (*See* Dkt. 10, Ex. Z, at Ex.1, 2.) The Magistrate also points
18 to several statements in the record probative of the fact that Petitioner could have pursued
19 testing of the blood during his trials. (*See* Dkt. # 15, at 17-18.)
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22 Petitioner argues, however, that the Prosecutor was “hiding” this evidence during trial.
23 Even if Petitioner is correct in his conclusion that the lack of blood evidence *could not* have
24 been discovered during trial because “the prosecutor [was] hiding [it],” there is no reason
25 why Petitioner had to wait over five years after he was convicted to seek testing of the blood
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1 alleged to have been collected.² (Dkt. # 17, at 4.) Even if the prosecution was “hiding” the
2 blood evidence, Petitioner, by acting with due diligence, would have learned what was
3 ultimately discovered in 2006 – that no blood evidence, in fact, had been collected. Even
4 assuming that Petitioner could not have learned of the absence of blood evidence during trial,
5 he still waited from January 2000, the date of his conviction, to October 2005, to exercise
6 diligence in discovering this fact. Therefore, the Court agrees that “the existence of any
7 blood evidence or lack thereof was not ‘newly discovered’ as that term is defined by section
8 2244, [and] Petitioner is not entitled to the later date for the beginning of the statute of
9 limitations regarding his federal habeas petition.”³ (Dkt. # 15, at 18.) The Court concludes
10 that Petitioner’s limitations period began to run on or about December 28, 2001, and expired
11 one year later – nearly five years before his habeas petition was filed.
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15 **II. Were Petitioner’s Habeas Claims Procedurally Defaulted in the State Courts?**

16 Procedural default may occur when a petitioner presents a claim to the state courts,
17 but the state courts do not address the merits of the claim because the petitioner failed to
18 follow a state procedural rule. *See, e.g., Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991). “If
19 a prisoner has defaulted a state claim by ‘violating a state procedural rule which would
20 constitute adequate and independent grounds to bar direct review . . . he may not raise the
21 claim in federal habeas, absent a showing of cause and prejudice or actual innocence.’” *Ellis*
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25 ²Arizona Revised Statutes § 13-4240, enacted in 2000, allows anyone convicted of a
26 felony to request DNA testing of evidence “in possession or control of the court or the state.”

27 ³Petitioner also requests an evidentiary hearing based upon his allegation of newly
28 discovered evidence. (Dkt. # 17, at 8.) Because the Court concludes that Petitioner’s
allegation of newly discovered evidence is erroneous, the Court denies the request.

1 *v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000) (quoting *Wells v. Maass*, 28 F.3d 1005, 1008
2 (9th Cir. 1994)).

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4 Petitioner's four habeas claims stem from his third petition for post-conviction relief.
5 Petitioner does not argue that any of his claims derive from either his direct appeals or his
6 first, second or fourth petitions for post-conviction relief. The finding in the R & R that
7 Petitioner's claims are procedurally defaulted is based on the fact that the state court applied
8 a procedural bar to the claims raised in Petitioner's third petition for post-conviction relief.
9 The state court refused to review the merits of his claims because Petitioner did not raise
10 them in a procedurally proper manner. (Dkt. # 10, Ex. DD) (finding that under Rule 32.2 of
11 the Arizona Rules of Criminal Procedure, Petitioner "is precluded from relief as to these
12 claims because they either were or should have been raised on direct appeal or in the first
13 Rule 32 proceeding.").

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16 Petitioner appears to argue that because he then sought review at the Arizona Court
17 of Appeals, the procedural bar was removed. *See Ylst*, 501 U.S. at 801 ("State procedural
18 bars are not immortal, however; they may expire because of later actions by state courts.").

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20 Petitioner would be correct only if the Arizona Court of Appeals had disregarded the
21 procedural bar. Nevertheless, that court only denied review of Petitioner's claims. (Dkt. #
22 10, Ex. JJ.); *see Ylst*, 501 U.S. at 806 (holding that where "the last reasoned opinion on the
23 claim explicitly imposes a procedural default, we will presume that a later decision rejecting
24 the claim did not silently disregard that bar and consider the merits.").

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26 Petitioner's final objection is that the state court erred in its application of Rule 32.2
27 of the Arizona Rules of Criminal Procedure which resulted in procedural default. (Dkt. # 17,
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1 at 7.) Federal courts, addressing habeas petitions, lack jurisdiction “to review state court
2 applications of state procedural rules.” *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999);
3 *see also High v. Ignacio*, 408 F.3d 585, 590 (9th Cir. 2005) (“This court accepts a state court
4 ruling on questions of state law.”); *Sweet v. Delo*, 125 F.3d 1144, 1151 (8th Cir. 1997) (“It
5 is not the office of a federal habeas court to determine that a state court made a mistake of
6 state law” in applying a state procedural bar.); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)
7 (stating that “it is not the province of a federal habeas court to reexamine state-court
8 determinations on state-law questions.”). Therefore, the R & R’s conclusion that the state
9 court’s procedural bar constituted an adequate and independent ground for denying
10 Petitioner’s claims is correct. Therefore, the Court accordingly will accept the R&R’s
11 conclusion that review of Petitioner’s claims are barred because the claim is procedurally
12 defaulted.

16 CONCLUSION

17 Accordingly,

18 **IT IS HEREBY ORDERED** adopting the Report and Recommendation (Dkt. # 15).

19 **IT IS FURTHER ORDERED** denying and dismissing with prejudice the Petitioner’s
20 Petition for Writ of Habeas Corpus (Dkt. # 1).
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DATED this 16th day of September, 2008.

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